No. 09-363

Supreme Court, U.S.
FILED
OCT 28 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

KEVIN COOPER,

Petitioner,

v.

ROBERT K. WONG, ACTING WARDEN, SAN QUENTIN STATE PRISON, SAN QUENTIN, CALIFORNIA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the bar on "second or successive" habeas petitions in 28 U.S.C. § 2244(b)(2)(B) apply to due process claims under *Brady v. Maryland*, 373 U.S. 83 (1963), based on the state's suppression or non-disclosure of material evidence, where the petitioner had no way of discovering the factual basis of the claim until after filing a previous federal petition?

2. If newly-discovered *Brady* claims can be considered successive, does the heightened burden of proof imposed by § 2244(b)(2)(B)(ii) have the unconstitutional effect of legislatively overruling this Court's interpretation of the 14th Amendment's Due Process Clause?

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INTEREST OF *AMICUS CURIAE*

The Innocence Network is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered after conviction can provide conclusive proof of innocence. The fifty-two current members of the Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[2] The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Innocence Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

In this case, the Innocence Network seeks to present a practical perspective on the issues raised in the hope that future wrongful convictions will be

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[1] The parties have consented to the filing of this brief. Their consent letters have been filed with the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The member entities are listed in the appendix.

minimized. The Innocence Network has found that, unfortunately, prosecutors do not always give the complete set of facts to juries and defendants. Juries have voted to convict because they were unaware of material exculpatory evidence. Innocent defendants have spent time in jail because they were unable to present their full case. This is a tragedy that should be avoided whenever possible. When a prisoner raises a claim that a prosecutor, in violation of both constitutional and ethical obligations, has suppressed or failed to disclose material evidence, that claim should be heard.

This petition presents the question of whether a newly-found *Brady* claim raised in a successive federal petition for habeas corpus should suffer a harsher burden of proof than a *Brady* claim raised in a first petition. The answer is no.

Kevin Cooper's case presents a perfect example of the injustice that would result from applying a harsher burden of proof. In this case, the prosecutor failed to disclose and destroyed at least three pieces of exculpatory evidence. *See Cooper v. Brown*, 565 F.3d 581, 620-29 (9th Cir. 2009) (Fletcher, J., dissenting). This evidence was not presented to the jury. Further, because of the prosecutor's suppression, the evidence was not discovered until after Mr. Cooper's first federal habeas petition had been filed. *Id.* Now, Mr. Cooper is in danger of being executed despite the existence of newly-found exculpatory evidence.

STATEMENT OF THE CASE

In May 1985, a jury convicted Kevin Cooper of the 1983 murders of Doug and Peggy Ryen, their daughter Jessica, and their houseguest Chris Hughes. That conviction was tainted by prosecutorial misconduct which denied the jury the ability to evaluate significant evidence that could have led to finding Mr. Cooper innocent.

At least three pieces of evidence suppressed by the prosecution could have been exculpatory: First, a prison warden had specifically contacted investigators with information indicating that bloody shoeprints left at the scene were from shoes that were not issued by Mr. Cooper's prison but could be obtained commonly. *See Cooper v. Brown*, 565 F.3d 581, 620-25 (9th Cir. 2009). Yet, the prosecution not only failed to disclose this information to defense counsel but knowingly presented testimony to the contrary. Second, investigators were given the bloody coveralls of a different suspect, and his girlfriend provided information that suggested he may have committed the crime instead. *See id.* at 625-27. A deputy destroyed the coveralls without first telling defense counsel, and the prosecution failed to disclose the report which suggests that, contrary to the deputy's testimony at trial, his superior officer had approved this action. Third, investigators recovered a bloody shirt near the crime scene. *See id.* at 627-29. The state's log indicates that this shirt corroborated witness testimony suggesting that the crime was committed by multiple other individuals. Once more, the jury was never given the opportunity to examine this

exculpatory evidence, because the prosecution disclosed neither the log nor the shirt to the defense.

The California State Supreme Court affirmed Mr. Cooper's conviction in 1991. *People v. Cooper*, 809 P.2d 865 (Cal. 1991). Mr. Cooper's first federal petition for habeas corpus was denied in 1997. His second federal petition was denied in 1998, and the denial was affirmed on appeal in 2002. In February 2002, Mr. Cooper filed an application to the Ninth Circuit requesting permission to file a successor habeas petition based on significant new *Brady* evidence. The Ninth Circuit granted the request. *Cooper v. Woodford*, 357 F.3d 1019 (9th Cir. 2004). The district court denied that successor petition. *Cooper v. Brown*, No. CV-04-00656-H (S.D. Cal. May 27, 2005) (Huff, C.J.) (Order Denying Successive Petition for Writ of Habeas Corpus). A three judge panel of the Ninth Circuit affirmed the district court's denial of the successor petition. *Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2007). On May 11, 2009 the Ninth Circuit denied rehearing. *Cooper v. Brown*, 565 F.3d 581 (9th Cir. 2009). Eleven circuit judges dissented to the denial of rehearing.

In his dissent to the Ninth Circuit's denial of rehearing, Judge Fletcher found that the State violated *Brady* in several respects by failing to disclose the exculpatory evidence listed above. *Id.* at 620-29. Cooper had no knowledge of any of this suppressed exculpatory evidence until 2004, well after Cooper's first habeas petition was filed. *See id.*

Because of these *Brady* violations, the defense did not have all the information to which it was

entitled. Had this critical evidence been provided to the defense, a jury could have easily found Cooper innocent. According to the petition, after the jury deliberation, one juror stated that if there had been one less piece of evidence against Cooper, the jury would not have voted to convict. (Petition at 16.)

SUMMARY OF ARGUMENT

This Court should grant the petition for writ of certiorari in Kevin Cooper's case to resolve the burden of proof required for claims of constitutional error under *Brady v. Maryland*, 373 U.S. 83 (1963), that are discovered and raised, for the first time, after a first habeas application has been filed.

In this case, the District Court and the Ninth Circuit applied the burden of proof stated in 28 U.S.C. § 2244(b)(2)(B)(ii) to Cooper's successive habeas petition involving *Brady* claims. This was a mistake. The correct burden of proof for newly-found *Brady* claims is that set forth in *Brady*, regardless of whether the *Brady* claim is raised in a first or successive habeas petition.

In *Brady* and its progeny, this Court held that a prosecution's suppression or failure to disclose material evidence violates constitutional requirements of due process and, despite procedural defaults, may qualify for federal court relief if there is a "reasonable probability of a different result" if the suppressed evidence had been disclosed to the defense. *E.g.*, *Banks v. Dretke*, 540 U.S. 668, 699 (2004). This is based on the Court's concern that justice should be done. *Cf. United States v. Bagley*,

473 U.S. 667, 675 (1985). Where material exculpatory evidence is withheld, meritorious *Brady* claims go to the core question of innocence or guilt and determine whether someone who is potentially innocent will have his claim fairly and constitutionally reviewed.

However, in 1996 Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), including 28 U.S.C. § 2244(b)(2)(B) which provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[3]

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[3] This brief addresses the issues presented by the second requirement, as the first ("could not have been discovered previously through the exercise of due diligence") is presumably satisfied in all newly-found *Brady* claims: *Brady* evidence, by definition, is suppressed, and could not have been discovered with due diligence.

It is unclear whether § 2244(b)(2)(B) purports to apply to newly-found *Brady* claims, and separate Circuit Courts have resolved this question differently. Application of AEDPA would create constitutional questions, as *Brady* is a constitutional requirement that cannot be superseded by a legislative act, and AEDPA's higher "clear and convincing" standard would preclude all meaningful relief for a significant class of constitutional violations — those that meet the *Brady* standard but not AEDPA's. In so doing, it would also create harmful and unjust consequences for habeas practice, contrary to AEDPA's intended purpose, by encouraging the state to continue to hide suppressed evidence and, in response, petitioners to file speculative or unripe claims.

Kevin Cooper's case thus presents this Court with an excellent opportunity to affirm that a *Brady* claim raised for the first time in a later habeas petition should be evaluated according to the Court's "reasonable probability of a different result" standard rather than Congress's "clear and convincing evidence" and "no reasonable factfinder" standard according to a literal reading of 28 U.S.C. § 2244(b)(2)(B). In so doing, the Court can resolve the conflict amongst the Circuits, restore the constitutional standard intended by *Brady*, and provide for more just and sensible habeas practice.

ARGUMENT

A. This Court Should Hold That AEDPA § 2244(b)(2)(B) Does Not Supersede This Court's *Brady* Constitutional Standard.

In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. "The *Brady* rule is based on the requirement of due process. Its purpose is . . . to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. The prosecution's duty to disclose thus exists even if there has been no request by the accused, and the duty encompasses impeachment evidence as well as exculpatory evidence. *E.g.*, *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *Bagley*, 473 U.S. at 676; *United States v. Agurs*, 427 U.S. 97, 107 (1976)). Where, as in Kevin Cooper's case, the suppressed evidence is both material and exculpatory, the underlying concern is one of innocence, as "a court cannot have confidence in the outcome of the trial." *Schlup v. Delo*, 513 U.S. 298, 316 (1995).

Accordingly, a successful claim under *Brady* requires the petitioner to show a "reasonable probability of a different result" if the evidence had been available at trial. *See Banks*, 540 U.S. at 699. By contrast, AEDPA requires a "second or successive" federal habeas petition to show "by clear and convincing evidence" that no reasonable

factfinder having all the facts would have found the applicant guilty. 28 U.S.C. § 2244(b)(2)(B)(ii). The unyielding application of AEDPA's "clear and convincing evidence" standard, in lieu of the "reasonable probability of a different result" standard from *Brady* and its progeny, to newly-found *Brady* claims raises constitutional problems that the Circuit Courts — and the District Court in this case — have failed to address adequately.

This Court's decision in *Brady* announced a constitutional standard for finding a due process violation. This means that any court applying the § 2244(b)(2)(B)(ii) standard instead has implicitly held that a legislative act supercedes this Court's constitutional rule. More alarmingly for habeas practice, courts applying the higher AEDPA standard would effectively deny remedy to due process violations sufficiently material and prejudicial to violate the Constitution, per *Brady*, yet unable to meet the higher threshold requirement of § 2244(b)(2)(B)(ii). This Court should grant certiorari in this case to interpret § 2244(b)(2)(B) in a way that resolves these constitutional problems.

1. *Brady*'s Standard Cannot be Superseded By AEDPA.

In *Brady*, this Court did not merely interpret federal law, but stated a "constitutional rule": "[S]uppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. . . . [T]wo decisions from the Third Circuit Court of Appeals . . . state the correct constitutional rule." *Brady*, 373 U.S. at 86 (citations

omitted). This Court reaffirmed this as recently as 2004. *See Banks*, 540 U.S. at 691 ("*Brady*, we reiterate, held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process . . . .'" (quoting *Brady*, 373 U.S. at 87)). The "reasonable probability of a different result" standard from the *Brady* line of cases thus arises from and embodies the Court's interpretation of the Constitution.

If AEDPA's heightened "clear and convincing evidence" standard were made applicable to all later-filed *Brady* claims, it would in effect narrow this Court's interpretation of the Fourteenth Amendment.

However, it has been well established that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution." *Dickerson v. United States*, 530 U.S. 428, 437 (2000); *see City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."))).

For example, in *Dickerson v. United States*, this Court held that *Miranda v. Arizona*, 384 U.S. 436 (1966), "announced a constitutional rule that

Congress may not supersede legislatively," because *Miranda* had "laid down 'concrete constitutional guidelines for law enforcement agencies and courts to follow'" that protect a suspect's Fifth Amendment rights. *Dickerson*, 530 U.S. at 435 (quoting *Miranda*, 384 U.S. at 442). Congress could not enact a statute two years later that altered or dispensed with those constitutional guidelines.

In *City of Boerne v. Flores*, the Court rejected Congress's attempt to change the standard that courts apply in challenges under the Free Exercise Clause of the First Amendment. The Court declared that, even though Congress is granted the power "to enforce" under § 5 of the Fourteenth Amendment, "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne*, 521 U.S. at 519. "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" *Id.* at 529.

This Court has laid down a constitutional guideline — the "reasonable probability of a different result" standard — for determining when suppression of evidence constitutes a due process constitutional violation, and Congress cannot, through the legislative act AEDPA, supersede the Court's determination. As a result, the *Brady* precedents should continue to apply:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

Id. at 536. The lower court's apparent application of AEDPA's "clear and convincing" standard to evaluate the petitioner's *Brady* claims in this case thus presents an opportunity for this Court to correct and clarify this constitutional problem.

2. Application of the AEDPA Standard Would Bar Remedy for a Class of Unconstitutional *Brady* Violations.

There can be no doubt that the "clear and convincing evidence" standard under § 2244(b)(2)(B)(ii) imposes a higher burden of proof than a "reasonable probability of a different result" under *Brady* — and as a result, there exists a subset of claims that meets (or exceeds) the *Brady* standard but cannot meet the § 2244(b)(2)(B)(ii) requirement. Thus, if § 2244(b)(2)(B) were made applicable to all successive habeas petitions involving *Brady* claims, there would be prosecutorial misconduct that, according to this Court's interpretation of the Fourteenth Amendment, is squarely

unconstitutional but that, according to § 2244(b)(2)(B), is barred from review.[4]

Barring all review of constitutional violations presents serious constitutional concerns. This Court has previously avoided interpretations of AEDPA that "would close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Castro v. United States*, 540 U.S. 375, 381 (2003) (citing *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996)). It has sought to ensure that petitioners are still provided "a meaningful avenue to avoid manifest injustice." *Schlup*, 513 U.S. at 327; *cf. Panetti v. Quarterman*, 551 U.S. 930, 946 (2007). Indeed, in applying *Brady*, this Court has resolutely refused to impose the type of due diligence on the petitioner that would be required by § 2244(b)(2)(B) as being fundamentally incompatible with constitutional due process:

> Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis

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[4] As discussed in Part C, this is not a remote hypothetical — a heightened standard of proof would not only create a constitutional concern but, as in *Panetti*, would also have serious implications for habeas practice and directly affect the outcomes of real cases, including this case.

> of mere suspicion that some prosecutorial misstep may have occurred." The "cause" inquiry, we have also observed, turns on events or circumstances "external to the defense."
>
> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," so long as the "potential existence" of a prosecutorial misconduct claim might have been detected. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily, we presume that public officials have properly discharged their official duties." We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed." Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.

Banks, 540 U.S. at 695-96 (internal citations omitted; alterations in original); *cf. Triestman v.*

United States, 124 F. 3d 361, 377–80 (2d Cir. 1997) ("[S]erious due process questions would arise if Congress were to close off all avenues of redress in such cases, especially when the prisoner could not have raised his claim of innocence — which appears on the record — in an effective fashion at an earlier time."), *cited by In re Davis*, 557 U.S. ___ (2009) (Steven, J., concurring).

§ 2244(b)(2)(B), interpreted strictly, would close off all meaningful avenues of redress and thus create a serious problem of constitutional due process. Because the delay which results in the deprivation is not the result of any shortcoming on the part of the petitioner but rather the state opposing him, § 2244(b)(2)(B) further exacerbates the constitutional problem by creating a perverse incentive for the state to further violate constitutional rights by continuing to suppress evidence until after the first petition has been filed. In order to avoid this pitfall, the petitioner then has the impossible burden of stating in his first petition what has been specifically hidden from him — that is, he must perform hide-and-seek "due diligence" or file speculative or unripe claims.[5] As suggested by *Banks*, such a system cannot possibly comport with even the most basic notions of constitutional due process.

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[5] *Brady* may thus be distinguishable from other constitutional cases because *Brady* violations cannot be discovered through due diligence.

3. This Court Can Avoid Constitutional Issues By Interpreting § 2244(b)(2) Not to Apply to Newly-Found Brady Claims.

This Court may avoid these constitutional questions by interpreting AEDPA as inapplicable to newly-discovered *Brady* claims. It is a "cardinal principle" of statutory construction that, if a statute remains ambiguous, it should be interpreted in the manner that avoids constitutional issues. *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

Such an ambiguity is present in the statute in question in the present case: Namely, it is unclear whether a newly-found *Brady* claim constitutes a "second or successive" petition within the ambit of § 2244(b)(2) because, as a result of prosecutorial misconduct, the claim could not have been brought any earlier. The Court has already noted, while interpreting the phrase in *Panetti v. Quarterman*, that the meaning of "second or successive" in § 2244(b)(2) is not strictly limited and takes into account pre-AEDPA case law:

> The phrase "second or successive" is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of [AEDPA]. The Court has declined to interpret

> "second or successive" as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application.

551 U.S. at 943-44 (citations omitted). In *Panetti*, the Court declared that the statutory bar on "second or successive" applications did not apply to an incompetent-to-be-executed claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), brought in an application filed when the claim "is first ripe." *Id.* at 947. Because a *Ford* claim is based on a petitioner's condition at the time of execution, the claim is not "ripe" if there is no early sign of illness within the one-year period for filing a first petition. In arriving at this interpretation of AEDPA, the Court considered the practical effects "when petitioners 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review of their unexhausted claims.'" *Id.* at 946-47.

Similar arguments have been made in the Circuit Courts for also exempting *Brady* claims. *Cf. United States v. Lopez*, 577 F.3d 1053, 1056 (9th Cir. 2009). A petitioner's as-yet-undiscovered *Brady* claim is not "ripe" because, as a result of the prosecution's suppression or failure to disclose, there is no "early sign" of a potential claim. A *Brady* claim is thus "ripe" to be made only after the suppressed or undisclosed evidence comes to light, even if this occurs after the first application has been filed. Accordingly, resolving the meaning of "second or successive" like in *Panetti* would allow this Court to

avoid the constitutional problems that would be raised by the application of § 2244(b)(2)'s "clear and convincing" standard to *Brady* claims.

B. This Court Should Grant the Petition to Resolve a Circuit Split Regarding the Standard of Review Applicable to a Successive Habeas Petition That Raises a Newly-Found *Brady* Claim.

There is significant confusion among the Circuit Courts and in the law about the standard of review applicable to successive federal habeas petitions that raise newly-found *Brady* claims. Some courts have found that a strict reading of "second or successive" in AEDPA requires that the heightened "clear and convincing evidence" standard be applied to new-found *Brady* claims, even where the state's failure to disclose exculpatory evidence was not revealed prior to the initial habeas proceedings. *See, e.g., Tompkins v. Sec'y, Dep't Corr.*, 557 F.3d 1257 (11th Cir. 2009); *Evans v. Smith*, 220 F.3d 306 (4th Cir. 2000).

Other courts, however, have recognized that doing so would interfere with the constitutional standard associated with raising *Brady* claims. *See, e.g., Lopez*, 577 F.3d at 1055 (calling the interplay between AEDPA and successive *Brady* petitions a "troublesome circumstance"); *Douglas v. Workman*, 560 F.3d 1156, 1187 (10th Cir. 2009). As discussed *supra*, these courts are correct. This Court should grant the petition to clarify that successive *Brady* claims are not governed by AEDPA's higher burden of proof.

1. The Ninth and Tenth Circuits Have Not Strictly Applied the AEDPA Standard to Successive Habeas Petitions Raising Newly-Found *Brady* claims.

In *United States v. Lopez*, the Ninth Circuit, when considering whether all second-in-time *Brady* claims should be subject to the AEDPA standard, did not strictly read AEDPA but rather applied this Court's practical approach in *Panetti*. According to the Ninth Circuit, *Panetti*: (1) established that "second or successive" should not always be read literally to foreclose certain claims; (2) "cautioned against interpreting AEDPA's 'second or successive' provisions in a way that would foreclose any federal review of a constitutional claim, or otherwise lead to perverse results, absent a clear indication that Congress intended that result"; and (3) set forth the relevant considerations for determining whether the AEDPA standard should apply to second-in-time habeas claims. *Lopez*, 577 F.3d at 1063.

The *Lopez* court applied the *Panetti* principles to second-in-time *Brady* claims. The court acknowledged that some second-in-time *Brady* claims should be exempt from AEDPA standards, reasoning that:

> [T]he broad rule the government advocates, under which *all* second-in-time *Brady* claims would be subject to [AEDPA standards], would completely foreclose federal review of some meritorious claims and reward prosecutors for failing to meet their constitutional disclosure obligations under

> *Brady*. This would seem a perverse result and a departure from the Supreme Court's abuse-of-the-writ jurisprudence.

Id. at 1064-65. Still, the court avoided ruling directly on the question, and instead determined that Lopez had failed to establish the materiality of her *Brady* claim.

The Tenth Circuit has similarly demonstrated concern about strictly applying the AEDPA standard of review to later-filed, but meritorious, *Brady* claims. In *Douglas v. Workman*, Douglas first discovered and raised his *Brady* claim while his appeal from the denial of his first habeas petition was pending. 560 F.3d at 1187. Recognizing that the petition was technically a "second or successive" claim subject to the AEDPA standard, the Tenth Circuit chose to avoid the stricter standard by treating the *Brady* claim as a supplement to the first habeas petition, instead of as a successive petition. The court then granted Douglas's petition. The court referred to *Panetti* as demonstrating that not all successive habeas petitions are subject to the AEDPA standard of review. The court then explained that the prosecutor's conduct in suppressing evidence "warrants special condemnation and justifies permitting Mr. Douglas to supplement his initial habeas petition." *Id.* at 1190. Finally, the court found that "any delay, inefficiency, or waste of judicial resources stems from the prosecution, not Mr. Douglas." *Id.* at 1194.

2. The Fourth and Eleventh Circuits Have Applied the AEDPA Standard to Successive Habeas Petitions Raising Newly-Found *Brady* claims.

By contrast, the Fourth and Eleventh Circuits have applied AEDPA strictly to *Brady* claims raised in successive habeas petitions. In *Evans v. Smith*, Evans raised an un-exhausted *Brady* claim while his first federal habeas petition was under review. 220 F.3d at 311. He asked the district court to stay consideration of his petition so that he could exhaust his *Brady* claim in state court. The district court rejected his request and denied habeas relief on his first petition. Evans then exhausted his *Brady* claim in state court and requested authorization from the Fourth Circuit to file the second petition. The Fourth Circuit denied authorization. The court applied the AEDPA standard to Evan's claim, explaining that "[t]o exempt Evan's *Brady* claim from the [AEDPA standard] would thwart the statutory scheme and render Congress' limitations on second or successive petitions a nullity in a wide range of cases." *Id.* at 324.

In *Tompkins v. Secretary, Department of Corrections*, Tompkins filed a first petition for writ of habeas corpus more than ten years after his conviction and a second petition nine years after that. 557 F.3d at 1257. His second petition raised multiple claims, including a *Brady* claim. Tompkins argued that the AEDPA standard should not apply to his claims because his claims had only recently become "ripe" under *Panetti*. The Eleventh Circuit rejected this argument, applied the AEDPA standard

to Tompkins' second petition, and found that he did not meet the standard.

3. Application of the AEDPA Standard of Review is Also Inconsistent with *Holland v. Jackson* and Related Circuit Decisions.

As demonstrated above, this Court should grant the petition because there is a strong circuit split over the applicability of the AEDPA standard of review to second-in-time *Brady* claims. The Court should also grant the petition because applying the AEDPA standard to successive, but meritorious, *Brady* claims would create an inconsistency with case law holding that federal courts can review *de novo Brady* claims that surface for the first time in federal habeas proceedings.

A number of Circuit Courts have concluded that, when a state prisoner makes a federal habeas claim based on *Brady* material that surfaces for the first time during the federal proceedings, the *Brady* claim is not inhibited by AEDPA standards of review. *See Joseph v. Coyle*, 469 F.3d 441, 469 (6th Cir. 2006) ("[Petitioner's] current *Brady* claim is not the same as the one he brought before the state court. Thus, [he] argues, his *Brady* claim was *not* 'adjudicated on the merits in State court proceedings,' and AEDPA's strict standard of review does not apply. We agree."); *Monroe v. Angelone*, 323 F.3d 286, 297 (4th Cir. 2003) ("AEDPA's deference requirement does not apply when a claim made on federal habeas review is premised on *Brady* material that has surfaced for the first time during federal proceedings."); *Killian v. Poole*, 282 F.3d 1204, 1208

(9th Cir. 2002) ("AEDPA deference does not apply to [a] claim [when] [e]vidence of the [claim] was adduced only at the hearing before the [federal] magistrate judge."); *Williams v. Coyle*, 260 F.3d 684, 706 (6th Cir. 2001), *cert. denied*, 536 U.S. 947 (2002). These courts evaluated petitioners' *Brady* claims under the *Brady* standard, inquiring whether there was a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Joseph*, 469 F.3d at 473.

This Court has recognized, and not corrected, this trend. In *Holland v. Jackson*, 542 U.S. 649, 653 (2004), this Court noted that "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer" and assumed, *arguendo*, that such an analysis was correct.

This line of decisions recognizes that AEDPA's provisions should not inhibit meritorious *Brady* claims. These cases acknowledge that failure to discover a *Brady* claim is not the fault of the petitioner.

Application of AEDPA's standard of review to second-in-time *Brady* claims would be inconsistent with these principles. Further, it would create a situation where the standard of review applicable to a petitioner's *Brady* claim depends on fortuity. Petitioners who receive notice of government suppression of exculpatory evidence before their first federal habeas claim will receive one standard of

review, while petitioners who receive notice after their first federal habeas claim will receive a different, stricter standard of review. *See, e.g.*, *Douglas*, 560 F.3d at 1195 (two petitioners with identical *Brady* claims were to receive disparate treatment under AEDPA because one had already filed a habeas petition when the *Brady* claim came to light). This outcome is fundamentally unfair.

C. This Court Should Grant the Petition to Clarify the Standard for Evaluating Newly-Found *Brady* Claims in Successive Petitions in Light of the Unjust Practical Implications for Habeas Practice and Policy of Applying § 2244(b)(2)(B)'s Heightened Standard.

According to its legislative history, AEDPA was enacted to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. Rep. No. 104-518, at 111 (1996). But AEDPA's goals of "comity, finality, and federalism," *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003), should not overcome the constitutional rights of habeas petitioners. *See Panetti*, 551 U.S. 930, 946 (2007) (stating that this Court resists interpretations of AEDPA that would "close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent"). Instead, AEDPA's purposes, along with "the practical effects of [this Court's] holdings, should be considered when interpreting AEDPA." *Id.* at 945. "This is particularly so when petitioners 'run the risk' under the proposed interpretation of 'forever losing their

opportunity for any federal review of their . . . claims.'" *Id.* at 945-46 (citing *Rhines v. Weber*, 544 U.S. 269, 275 (2005)).

Here, the practical interest in maintaining meritorious *Brady* claims based on newly-found evidence must overcome AEDPA's interest in comity, finality, and federalism.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 28, 2009